Supreme Court, U.S.
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No. 00-1046

# In the Supreme Court of the United States

STEVEN HENRY ARTHUR ADAMS, for Himself and as Representative of Certain Underwriters at Lloyd's; INDEMNITY MARINE ASSURANCE COMPANY LTD; THE YORKSHIRE INSURANCE COMPANY LIMITED; COMMERCIAL UNION ASSURANCE COMPANY PLC; PHOENIX ASSURANCE PLC; CORNHILL INSURANCE PLC; NORWICH UNION FIRE INSURANCE SOCIETY LTD; NORTHERN ASSURANCE CO., LTD; SKANDIA UK INSURANCE PLC; OCEAN MARINE INSURANCE COMPANY, LTD.; FOLK SAM INTERNATIONAL INSURANCE COMPANY (U.K.) LTD; SCOTTISH LION INSURANCE COMPANY LTD; WURTTEMBERGISCHE FEUERVERSICHERUNG AG; SPHERE DRAKE INSURANCE PLC; DAI-TOKYO INSURANCE COMPANY (U.K.) LTD.

Petitioners

VERSUS

AMERICAN EAGLE MARINE, INC., and A.K. STEEL CORPORATION, formerly known as Armco Steel Company, L.P.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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2. Indemnity Marine Assurance Company, Ltd., Petitioner

3. The Yorkshire Insurance Company Limited, Petitioner

4. Commercial Union Assurance Company, PLC, Petitioner

5. Phoenix Assurance PLC, Petitioner

6. Cornhill Insurance PLC, Petitioner

7. Norwich Union Fire Insurance Society, Ltd., Petitioner

8. Northern Assurance Company, Ltd., Petitioner

9. Skandia UK Insurance PLC, Petitioner

10. Ocean Marine Insurance Company, Ltd., Petitioner

11. Folk Sam International Insurance Company (U.K.) Ltd., Petitioner

12. Scottish Lion Insurance Company, Ltd., Petitioner

13. Wurttembergische Feuerversicherung, AG, Petitioner

14. Sphere Drake Insurance PLC, Petitioner

15. Dai-Tokyo Insurance Company (U.K.) Ltd., Petitioner

16. UMS Generali Marine S.p.A., formerly known as Union Mediterranea Di Sicurta

17. American Eagle Marine, Inc., Respondent

18. A.K. Steel Corporation, formerly known as Armco Steel Company, L.P., Respondent

19. Britamco Underwriters, Inc.

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## RULE 29.6 STATEMENT

A. K. Steel, Inc. is a wholly-owned subsidiary of A.K. Steel Holdings Corporation, a publically traded corporation.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

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STEVEN HENRY ARTHUR ADAMS, for Himself and as Representative of Certain Underwriters at Lloyd's; INDEMNITY MARINE ASSURANCE COMPANY LTD; THE YORKSHIRE INSURANCE COMPANY LIMITED; COMMERCIAL UNION ASSURANCE COMPANY PLC; PHOENIX ASSURANCE PLC; CORNHILL INSURANCE PLC; NORWICH UNION FIRE INSURANCE SOCIETY LTD; NORTHERN ASSURANCE CO., LTD; SKANDIA UK INSURANCE PLC; OCEAN MARINE INSURANCE COMPANY, LTD.; FOLK SAM INTERNATIONAL INSURANCE COMPANY (U.K.) LTD; SCOTTISH LION INSURANCE COMPANY LTD; WURTTEMBERGISCHE FEUERVERSICHERUNG AG; SPHERE DRAKE INSURANCE PLC; DAI-TOKYO INSURANCE COMPANY (U.K.) LTD.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A.K. Steel respectfully submits the following Brief in Opposition to the Petition for Writ of Certiorari filed by Steven Henry Arthur Adams, et al., to the United States Court of Appeals for the Fifth Circuit to review the Judgment of the Fifth Circuit in this case.

## CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana is reproduced as Appendix A to Petitioners' Petition for Writ of Certiorari.

The Fifth Circuit Court of Appeals entered Judgment on September 19, 2000. The opinion of the United States Court of Appeals for the Fifth Circuit is published as Adams, et al v. Unione Mediterranea de Sicurta, et al, 220 F.3d 659 (5th Cir. 2000) and is reproduced as Appendix B to Petitioners' Petition for Writ of Certiorari.

## JURISDICTION

Jurisdiction of this Court is involved under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution Art. III § 2 and 28 U.S.C. § 1333.

## STATEMENT OF THE CASE

Contrary to petitioner's arguments, the issue on appeal is did the lower courts commit reversible error by allowing the good faith salvor, American Eagle[1], and good faith purchaser, A.K. Steel, to set off an award of damages through recoupment of the salvage lien?

In an attempt to elevate the importance of a case which petitioners acknowledge "is not important in itself", petitioners try to portray the respondents as "seagoing opportunists"and cast aspersions by referring to respondents as embezzlers and privateers. Petitioners also decry the lower courts' decisions as overturning two centuries of this Court's precedent and bemoan the potential impact of the decision on world commerce. During this lengthy foreshadowing of doom, petitioners' writ chooses to ignore acknowledging the factual finding by the district court that there was no proof of bad faith on the part of American Eagle or A.K. Steel. Equally as important, petitioners' writ fails to cite a single case in support of their argument that the lower courts committed reversible error by allowing a good faith salvor and purchaser to setoff an award of damages, through recoupment, of the salvage lien.

Rather than overturning centuries old precedent or severely impacting the world's shipping business, this case is

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[1]American Eagle has filed a waiver with the Court and will not be filing an opposition to this writ application. This decision is based on American's Eagle's bankruptcy and finding of no coverage by the Fifth Circuit as to American Eagle's underwriter, Britamco.

simply an appeal by a losing party whose identical arguments were made to and rejected by the lower courts. The simple fact is petitioners failed to prove that American Eagle's or A.K. Steel's conduct arose to the level of bad faith so as to warrant a forfeiture of the salvage lien. Likewise, allowing a good faith salvor and purchaser to recoup their lien through the use of an affirmative defense does not run counter to, or overturn, this Court's precedent. Rather, such an equitable application of recoupment is exactly the type of public purpose that the law of salvage was designed to foster-- the encouragement of salvors to undertake their often dangerous mission.

This case involves nothing more than the lower courts allowing a good faith salvor and purchaser the opportunity to recoup a salvage lien. As adeptly stated by the district court, "(t)his conclusion conforms with the goals promoted in salvage law and further prevents any unjust enrichment to plaintiffs(petitioners)". Nothing in the lower courts' decisions warrants this Court's review.

## STATEMENT OF THE FACTS

As required by this Court's rules, A.K. Steel will delineate petitioners' material omissions of facts by stating a more complete synopsis of the relevant facts. The following are excerpts of the factual and legal findings of the district court, as well as uncontested facts.

- On October 16, 1993, Duferco owned the steel when it sank.

- Duferco hired the Italian Claims Agency ("ICA") as its agent for purposes of coordinating salvage of the cargo. ICA, in turn, hired American Eagle to salvage the steel on January

31, 1994. (Petitioners' Appendix, Exhibit a, page 5, hereinafter designated "Pet. App. A-5").

•From January 31, 1994 to July 6, 1994, American Eagle was unable to salvage the steel slabs because the water level of the Mississippi was too high. (Pet. App. A-7)

•On June 10, 1994, petitioners filed their declaratory action regarding insurance coverage. While A.K. Steel was named as a defendant in this suit, it never became a party and was dismissed without prejudice on January 16, 1995.

•On July 6, 1994, ICA canceled the salvage contract with American Eagle, stating in a letter that "we are instructed by Duferco, S.A., to cancel said contract of salvage as cargo has been abandoned." (Pet. App. A-8)

•On July 28, 1994, Duferco "abandoned" the cargo. (Pet. App. A-8)

•On August 23, 1994, Petitioners refused to accept the abandonment of the steel slabs by Duferco. (Pet. App. A-8-9)

•In January 1995, American Eagle first contacted A.K. Steel regarding the salvage and sale of the steel. (Pet. App. A-11)

•American Eagle would not have salvaged the steel if it was unable to locate an acceptable purchaser in advance of its efforts. (Pet. App. A-15)

•On February 1, 1995, and unbeknownst to American Eagle or A.K. Steel, petitioners paid Duferco $986,352.41 in settlement of the insurance dispute and executed an assignment and release which the district court later

determined at trial to have transferred ownership of the steel to petitioners. (Pet. App. A-9)

• From February 18, 1995 through April 26, 1995, American Eagle salvaged 128 of the steel slabs at high cost and with great risk associated with the task. (Pet. App. A-13)

• Petitioners did not seek to assert any ownership interest in the steel slabs until after the salvage operation was completed. (Pet. App. A-13)

• Petitioner had no intention of asserting ownership, selling or salvaging the sunken cargo. (Pet. App. A-10, 13)

• In early March 1995, American Eagle sought possession of the chemical composition of the steel from Duferco, in order to maximize the value of the steel. (Pet. App. A-11-12)

• On March 4, 1995, Duferco gave permission for the steel's "chemistries" to be released to American Eagle, thereby making apparent that Duferco was not interested in purchasing the salvaged steel. (Pet. App. A-12)

• A.K. Steel made the only acceptable bid on the steel. (Pet. App. A-12)

• On March 8, 1995, the contract between American Eagle and A.K. Steel was finalized. The contract required that American Eagle "warrant and document" that the steel had been abandoned by "owners/underwriters." (Pet. App. A-13)(Respondent's Appendix, Exhibit A, hereinafter designated "Res. App. A").

•On April 24, 1995, counsel for petitioners learned of the ongoing salvage operation by American Eagle. (Pet. App. A-13)

•On April 26, 1995, American Eagle completed the successful salvage of 128 of the 158 sunken steel slabs and delivered 127 slabs to A.K. Steel. (Pet. App. A-13)

•On April 27, 1995, American Eagle received the final payment for the steel from A.K. Steel. (Pet. App. A-13)

•American Eagle salvaged the steel slabs in good faith. (Pet. App. A-18)

•American Eagle was paid $525,424.32 by A.K. Steel or $176 per ton. Out of this sum, American Eagle had salvage expenses of $450,198.91 and profit of $75,225.41. (Pet. App. A-13, 15)

•A.K. Steel purchased and consumed the salvaged steel in good faith. (Pet. App. A-15)

•On April 27, 1995, counsel for petitioners contacted petitioners to advise of the salvage and request permission to put the salvor on notice. (Pet. App. A-13)

•On April 27, 1995, counsel for petitioners advised petitioners that American Eagle's actions would give rise to a salvage claim and that petitioners should "keep in mind" that they would have had to raise the steel slabs anyway at a significant cost to underwriters. (Pet. App. A-13-14; Res. App. B)

- On April 27, 1995, petitioner advised American Eagle of its alleged ownership. (Pet. App. A-14)

- On May 5, 1995, petitioners advised A.K. Steel of its alleged ownership interest.

- Apart from these generic threats, petitioners took no emergency legal action in May 1995 to gain possession of the cargo, halt delivery or prevent consumption. (Pet. App. A-17)

- On August 15, 1995, petitioners amended their declaratory action to add American Eagle and A.K. Steel as defendants and sought to negate the sale between the respondents. (Pet. App. A-14)

- On November 29, 1995, American Eagle filed its Answer and Defenses which specifically raised the defense of a maritime lien for the salvage services. (Res. App. C).

- On December 21, 1995, A.K. Steel filed its Answer and Defense, as well as a Declaratory Action to Quiet Title.

- On December 24, 1997, A.K. Steel amended its Answer and Defenses without opposition and specifically raised the alternative affirmative defense of set off of the salvage lien. (Pet. App. A-32; Res. App. D).

- Petitioners did not challenge the basic elements of American Eagle's salvage claims; 1) peril to property, 2) voluntary service and 3) successful salvage. (Pet. App. A-35)

- Petitioners presented no evidence at trial that the salvage effort was negligently performed, that the salvage expenses

were unreasonable, that the job could have been more efficiently, easily or successfully performed. (Pet. App. A-16)

•On June 19, 1998, the district court awarded petitioners total damages of $827,277.06 or 83.87% of its payment to Duferco. Petitioner was awarded $789,081.93 against UMS GENERALI MARINE S.p.A. ("UMS") or 80% of the coinsurance dispute. Petitioner was awarded $38,195.13 against American Eagle and A.K. Steel or 20% of the salvage dispute damages. UMS was awarded $152,780.55 or the remaining 80% of the salvage dispute damages. (Pet. App. A-40)

## SUMMARY OF THE ARGUMENT

Petitioners would have this Court believe that the lower courts' decisions would overturn the centuries old precedent of this Court, impact on world commerce and divest the federal courts of admiralty jurisdiction. While this argument may be a novel way to pique this Court's curiosity in order to have a writ accepted, the dramatic prose and dire predictions ignore the fact that this is a relatively simple substantive and procedural case which does not portend the ill effects foreshadowed by the petitioners.

This case involves the salvage, sale and consumption of steel slabs, which the salvor and purchaser believed to have been abandoned by the owner, and the subsequent litigation over the ownership of that steel and/or right to offset any damages with the the recoupment of a salvage lien.

The case in a nutshell is as follows: Prior to the salvage of the steel, the steel's owner, Duferco, had abandoned it. Based on this belief, American Eagle

commenced the salvage and sold its rights to A.K. Steel. As part of that contract, A.K. Steel required American Eagle to "warrant and document" the abandonment of the steel by "owners/underwriters." Subsequent to the salvage, sale and consumption of the steel, the new alleged owners, petitioners, filed a declaratory action to negate the sale of the steel between respondents. In turn, American Eagle filed its answer and defenses which specifically denied the alleged ownership of petitioners and raised as an affirmative defense its lien for salvage services. Likewise, A.K. Steel, filed its answer and a declaratory action to quiet title. Subsequently, A.K. Steel amended its pleadings without opposition to specifically include, alternatively, an affirmative defense of the salvage lien as an offset to any damages. At trial, the district court held that the law of finds did not apply to the steel because, while the original owner, Duferco, had abandoned the steel, the respondents had not shown by "clear and convincing" evidence that Duferco had intended a complete abandonment of title. Therefore, petitioners' subsequent insurance payment and execution of release transferred ownership of the steel to petitioners.

The district court found that, while both American Eagle and A.K. Steel had acted in "good faith", they had negligently converted the steel. In turn, the district court found that both American Eagle and A.K. Steel had, through the use of affirmative defenses, preserved the right to set off the award of damages to petitioners and UMS by recoupment of the salvage lien.

Contrary to the assertions of petitioners, the lower courts simply allowed a "good faith" salvor and purchaser the opportunity to set off an award of damages through the use of affirmative defenses to recoup their salvage lien. The use of

the well established procedure of using an affirmative defense to allow a salvor and purchaser the opportunity to recoup the extensive salvage expense does not run contrary to this Court's precedent. Rather, it runs parallel to and in conjunction with the primary purpose of salvage law- to encourage the "good faith" salvor to undertake the arduous and hazardous salvage of imperiled goods. Moreover, the use of recoupment as an affirmative defense is well recognized by this Court.

Petitioner, on the other hand, would have this Court fashion a rule that a "good faith" salvor, who asserts his salvage lien by means of an affirmative defense instead of a separate action, is not entitled to offset an award of damages with the salvage lien. In other words, the petitioners wants a rule that allows petitioners the full benefit of the salvor's efforts without having to spend a single penny. Such a ruling runs counter to the equity basis of an admiralty court's jurisdiction and would have the effect of discouraging, not encouraging, salvage. Moreover, and as the district court found, such a ruling would result in an unjust enrichment in favor of the petitioners.

Salvage law allowed the petitioners the opportunity to prove that American Eagle's and A.K. Steel's conduct warranted the forfeiture of the salvage lien, but they were unable to prove the requisite bad faith. Instead, the lower courts followed established procedural law and fashioned an equitable remedy by allowing a "good faith" salvor and purchaser to offset a damages award by recoupment of the salvage expenses. This holding by the lower courts does not contravene the precedent of this Court nor cause the myriad of other dire predictions of the petitioners. As such, the Court should not accept this writ application.

## ARGUMENT

### A. WHETHER THE LOWER COURTS COMMITTED REVERSIBLE ERROR BY ALLOWING A GOOD FAITH SALVOR AND PURCHASER TO SET OFF AN AWARD OF DAMAGES THROUGH THE RECOUPMENT OF THE SAVAGE LIEN?

The general principle of recoupment is applicable to the law of salvage and allows a good faith salvor and purchaser the right to offset an award of damages with the salvage lien. The lower courts use of recoupment to allow such an offset was neither an error nor in contravention to this Court's precedent.

On the other hand, the overwhelming majority of petitioners' writ chooses to ignore answering this question. Rather than responding to this issue, petitioners spend nearly all of their brief setting forth lengthy quotations from cases with ancillary relevance in an attempt to deflect an analysis of this issue and try to create a conflict with this Court's precedent where none truly exists.

#### 1) THE USE OF AN AFFIRMATIVE DEFENSE TO ALLOW THE RECOUPMENT OF A SALVAGE LIEN BY A GOOD FAITH SALVOR AND PURCHASER IS NOT AN ERROR

According to petitioners, a salvor must either return the property to the owner and proceed in personam against the

owner, or file an action in rem against the res in order to preserve a salvage lien. While the petitioners provide a number of lengthy quotations, their writ does not provide a single legal citation to support the argument that a salvage lien must be "exclusively" preserved by these two methods. While these cases provide guidance regarding the prosecution of a salvage lien, they offer no assistance in the analysis of the defensive application of a salvage lien. In fact, Petitioners' argument completely avoids discussing the defensive use of a salvage lien as a recoupment in litigation over the ownership of salvaged goods.

a) Equity: The Lower Courts' Perspective of a Good Faith Salvage Lien

In analyzing the arguments regarding the alleged errors of the lower court, this Court should view the arguments from the district court's perspective of the evidence. Here, the district court was faced with the reality that, absent American Eagle's salvage efforts, there would have been no salvage claim because petitioners had no interest in salvaging the steel until after it was salvaged. (Pet. App. A-16-17). Moreover, American Eagle and A.K. Steel had received notice that the owner, Duferco, had abandoned the steel and had no notice of petitioners alleged ownership of the steel until after the extensive salvage efforts and final contract payment had been made. In other words, the district court was faced with a case where it found the conduct of the respondents to have been in good faith but within the context of a claim for negligent conversion of salvage goods. Couple these finding with petitioners' acknowledgment that American Eagle's salvage would give rise to a salvage claim and that underwriters would also have had incurred

significant cost to salvage the steel (Pet. App. A-14; Res. App. B) and the district court could reach only one logical and equitable conclusion – allow the offset of the award of damages by recoupment of the salvage lien. To hold otherwise would deprive a good faith salvor credit for his efforts and result in an unjust enrichment to the petitioners. (Pet. App. A-33)

Regarding the latter, this Court should take into account the equitable considerations of the district court regarding the potential for the unjust enrichment of petitioners. In its judgment, the district court explains its rationale for finding that respondents had negligently converted the steel, while at the same time allowing respondents to set off their salvage expenses against the judgment in favor of petitioners: "(t)his conclusion conforms with the goals promoted in salvage law and further prevents any unjust enrichment to plaintiffs (petitioners)." (Pet. App. A-33).

As a court sitting in admiralty, the district court was compelled to take such equitable considerations into account in making its determination in this regard. Norris, *Salvage* §6 (1958)(stating that admiralty courts of seafaring nations universally recognize the proposition, derived from Roman law, that admiralty courts must prevent the unjust enrichment of claimants). See also, Vernicos Shipping Co. v. United States, 349 F.2d 465 (2nd Cir. 1965). In the instant case, the district court was faced with a situation in which a salvor saved goods it thought to be abandoned, and sold those good to a third party. The district court found this conduct to be negligent, as petitioners were ultimately found to be the owners of the salvaged goods, and awarded petitioners

damages equal to the value of the steel for respondents' negligent conversion thereof.

However, the district court went on to point out at numerous times in its opinion that the cargo was lost and valueless until respondent American Eagle salvaged the cargo, incurring considerable expense in so doing. The district court further recognized that to allow petitioners to recover the value of the cargo without having to pay for its salvage would amount to unjust enrichment accruing to petitioners in excess of $500,000.00. The district court and United States Fifth Circuit Court of Appeals found such a concept hostile to their respective senses of equity and justice. This Court should consider the unjust enrichment of petitioners when deciding on their writs requested relief.

b) Recoupment of a Salvage Lien

"At common law the term 'recoupment' described a claim that could assert against plaintiff only if it arose from the same transaction as plaintiff's claim. It was purely defensive in character and could only be used to defeat or diminish plaintiff's recovery; recoupment could not be the basis for affirmative relief." Wright & Miller, *Federal Practice and Procedure*, §1401 (West 1995). A.K. Steel respectfully submits that the established case law and Federal Rules of Civil Procedure allow the recoupment of a salvage lien through the use of an affirmative defense.

The district court and circuit court were well within their discretion to allow respondents' salvage lien claim to be asserted as an affirmative defense by means of recoupment, based upon the succinct analysis presented in Basic Boats, Inc. v. United States, 311 F.Supp. 596 (E.D. Va. 1970).

In Basic Boats, the owner of a sailing ketch known as CONJUR MAN sued the United States for alleged damage done to the CONJUR MAN in salvage efforts performed by the destroyer USS WALLACE L. LIND on July 27, 1967. The United States filed its answer and counterclaim, the latter asserting a claim for salvage.

The plaintiff moved for a dismissal of the counterclaim as being time barred under 46 U.S.C. §730.[2] While the Basic Boat court found the salvage counterclaim untimely, it still allowed the United States to assert its salvage claim as an affirmative defense. The court reasoned:

> Since the facts supporting the counterclaim undeniably arose out of the same cause of action which gives rise to plaintiff's suit, there is ample authority to the effect that the counterclaim should be treated as an affirmative defense by way of recoupment, and this is true even though as an affirmative cause of action it may be barred by limitation. Pennsylvania R.Co. v. Miller, 124 F.2d 160 (5th Cir. 1941); Luckenbach Steamship Co. v. United States, 312 F.2d 545 (2nd Cir. 1963); United States v. Western Pac.R.R., 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956).

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[2]In the instant case the statute of limitation for salvage claims is not an issue on appeal because petitioners never asserted a defense based upon the two-year limitation period of 46 U.S.C. §730. Also, American Eagle raised the lien status in its answer to petitioner's lawsuit and A.K. Steel amended its answer without opposition to raise the affirmative defense of recovery of the salvage lien. (Res. App. - D) F.R.C.P. 15(c).

In coming to this conclusion, the court in Basic Boats cited Wright, *Federal Courts*, §79 (1963) for the proposition that "the better rule is that a counterclaim, which arises out of the same cause of action, may be asserted for the purpose of recoupment to prevent or reduce a judgment, even though affirmative relief will not be given on such counterclaim if it is time-barred."

Recoupment, the setting off against asserted liability by means of an affirmative defense, is not barred by a statute of limitations so long as the main action is timely. Reiter v. Cooper, 507 U.S. 258, 264, 113 S.Ct. 12132, 122 L.Ed.2d 604 (1993). In Reiter, this Court was presented with an issue under the Interstate Commerce Act regarding a counterclaim based on reasonable rates and the argument that it was barred by a two year statute of limitation. In acknowledging that recoupment, as a general rule, is not barred by a statute of limitation if the main action is timely, the Court also confirmed that the general principle of recoupment is applicable in other contexts. Id. at 264. While the case at bar does not raise the issue of the respondents' affirmative defenses being barred by a statute of limitation, it most certainly raises the issue of the scope of application of the general principle of recoupment.[3]

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[3]In its decision, the district court mistakenly held that A.K. Steel amended its "answer and counterclaim" to assert a salvage lien on December 24, 1997 and, therefore, the counterclaim was barred because of the two year statute of limitation. (Pet. App. A-32) This mistake was compounded by the Fifth Circuit's decision. (Pet. App. B-29-30). On December 24, 1997, A.K. Steel amended its answer and defenses, complaint for declaratory action and cross claim to include the "affirmative defense" regarding the right to set off the salvage expenses. A.K. Steel did not file a counterclaim. (Res. App. D). Under *Fed R. Civ. P.*, Rule 15(c), the affirmative defense relates back to its original filing of petitioner's complaint because it arose "out of the same conduct, transaction or occurrence."

Recoupment "is a defense that goes to the foundation of plaintiff's claim by deducting from plaintiff's recovery all just allowances or demands accruing to the defendant with respect to the same contract or transaction." Distribution Services, Ltd. v. Eddie Perter Interests, Inc., 897 F.2d 811, 812 (5th Cir. 1990)(citations omitted). As a purely defensive procedure, it is available to defendant so long as plaintiff's claim survives. Id. at 813. In Distribution Services, the Fifth Circuit was faced with the issue of a "counterclaim" for cargo damage brought by way of recoupment being barred by the two year statute of limitation in the Carriage of Goods by Sea Act. 46 U.S.C.A. App. §1303(6). The Fifth Circuit held that a recoupment defense was still viable even if the affirmative cause of action was precluded by the statute of limitations. Id. It is thus clear that the general principle of recoupment is not foreign to admiralty courts.

In fact, admiralty courts have long held that a property owner may set off a salvage award with the damage to the salved property which is caused by the salvor's ordinary negligence. Schoenbaum, *Admiralty and Maritime Law*, §16.4, 3rd Ed. (2001). It stands to reason then that such a set off should be allowed in the opposite case where there is a suit for ownership and a request for set off of any damages by recoupment of a good faith salvage lien.

The reasoning applied in Reiter, Distribution Services, and Basic Boats, which relies on the doctrine of recoupment, is equally applicable to this case. Believing themselves to be the rightful owners of the abandoned steel, A.K. Steel initially filed a declaratory action to quiet title, while American Eagle's defenses to petitioners' suit specifically raised the lien status of their salvage services.(Res. App. C). When it became apparent that petitioners could possibly be deemed the owners

of the steel, A.K. Steel amended its answer without opposition to raise the affirmative defense of recovery of the salvage lien. (Res. App. D). Like the United States in Basic Boats, respondents did not seek to prosecute a salvage lien, but only sought to assert it as a defense in response to the affirmative actions of plaintiffs. Thus, like the court in Basic Boats, the district court in the instant case recognized that defendants/respondents were still entitled to credit for their good faith salvage efforts which ultimately benefitted plaintiffs/petitioners. Such reasoning is firmly grounded in law and is consistent with the facts of this case. Thus, this Court should leave the lower courts' judgment undisturbed.

Petitioners attempt to distinguish Basic Boats from the case at bar. Petitioners state that Basic Boats "does not, in any sense, support to the court's reasoning. The only reason that the U.S. Navy could successfully plead set-off was because it had returned the res to the owner." Petitioners, however, misconstrue the nature of a recoupment defense.

Recoupment allows a defendant to deduct from a plaintiff's recovery all just allowances or demands accruing to the defendant with respect to the same transaction. Reiter supra; Distribution Services, Id.; Basic Boats, supra. The doctrine of recoupment does not require the cause of action through which recoupment is sought to stand on its own with respect to all elements of recovery. To the contrary, the doctrine of recoupment only allows a defensive claim for the purpose of set-off to be asserted, even if affirmative relief on such a cause of action could not be granted. Reiter, Id.; Distribution Services, Id.; Basic Boats, supra.

In the instant case, the district court made the factual finding that respondent American Eagle salvaged the steel in

good faith and that A.K. Steel purchased and consumed the steel in good faith. (Pet. App. A-15) Equally as important, petitioners offered no proof of respondents bad faith. (Pet. App. A-35) The district court further found that "Plaintiffs [Petitioners] offered no evidence that the salvage effort was negligently performed, that the salvage expenses were unreasonable, that the job could have been more efficiently, easily, or successfully performed." (Pet. App. A-16). Therefore, the district court concluded that respondents were entitled to assert recoupment of the salvage lien as an equitable defense to petitioners' claims. (Pet. App. A-33)

The district court, sitting as an admiralty court, was within its authority to determine that respondents were entitled to a recoupment defense for their salvage efforts. Indeed, any salvor's right to a salvage lien is to be determined on a case by case basis. Jackson Marine Corp. v. The Blue Fox, 845 F.2d. 1307, 1309 (holding that the appropriate response to a finding of fraud or misrepresentation on a salvor's right to a salvage lien will depend on the facts of the particular case). While admiralty courts have traditionally been vigilant in protecting mariners from unscrupulous and dishonest salvors, The Belle Corrunes, 19 U.S. 152, 5 L.Ed. 229 (1821), this vigilance has been based on the heightened vulnerability of a distressed ship and crew to exploitation by salvors ("the law cannot. . . tolerate salvors' dishonest, corruption, fraud, falsehood, either in rendering the service, or in their proceedings to recover the salvage." Church v. Seventeen Hundred and Twelve Dollars, 5 F. Cas. 669 (S.D. Fla. 1853)).

In this case, petitioners were not in a heightened state of vulnerability, nor were they at the mercy of the salvors. They were simply uninterested in seeing the steel salvaged

until after that act had been accomplished by another. Thus, when reviewing this case on its particular merits, as an admiralty court is compelled to do, the district court concluded that respondents' actions did not require a forfeiture or reduction in their salvage claim. Such a factual finding, affirmed as it was by the United States Fifth Circuit Court of Appeals, was not manifestly erroneous.

## 2) PETITIONERS' WRIT: SALVAGE JURISPRUDENCE THRU VIABILITY OF THE SALVAGE CLAIM

### a) The Court's Precedent - A Bad Faith Salvor is Not Entitled to a Salvage Award

In an effort to elevate the impact of the lower courts' decisions, petitioners' writ begins with the axiomatic concept of salvage law that a bad faith salvor forfeits his entitlement to a salvage lien. While respondents do not deny that this is a correct statement of law, it is irrelevant to the true issue of this writ application, i.e. the lower courts' error, because the district court found that the respondents' efforts in salvaging and purchasing the steel were in <u>good faith</u>. (Pet. App. A-15)

However, a historical review of this Court's precedent does put the lower courts' allowance of the recoupment of the salvage lien in perspective. As such, a review of the cases cited by petitioners is instructive with regard to the true nature of respondents' conduct and petitioners' failure to prove bad faith.

Petitioners cite Mason v. The Blaireau, 6 U.S. 240 (1804), for the proposition that a salvor who attempts to embezzle salvaged property should forfeit his salvage award.

In the instant case, however, the district court found no nefarious intent on the part of respondents. In fact, the district court held that "there was no proof of bad faith on the part of A.K. Steel or American Eagle with respect to salvage, sale and purchase of the steel slabs." (Pet. App. A-35). To the contrary, the district court commended American Eagle for its efforts in salvaging the steel when it stated: "The court is critically aware that the cargo would not have been salvaged but for the efforts of American Eagle. . . ." Rather than treating respondents as embezzlers of the salvaged property as suggested by petitioners, the district court found American Eagle and A.K. Steel had acted in "good faith". (Pet. App. A-15).

Petitioners next cite Rowe v. The Brig, 20 F.Cas. 1281 (Cir. Ct. Mas. 1818) for the pronouncement of the policies behind the law of salvage and for the proposition that petty plunderage and concealment of the salvaged property has to be discouraged. However, this proposition again has no connection to the facts of this case because of the respondents' good faith. Likewise, the district court found that its holding did promote the policies of salvage law. (Pet. App. A-33).

The petitioner's next citation to The Bello Corrunes, 19 U.S. 152 (U.S. 1821) is for the same proposition that spoilation or gross neglect warrants the forfeiture of the salvage award. In The Bello Corrunes, the Court stated the petitioners' "libel for salvage, to be not only groundless but impudent, for, besides spoilation, smuggling, the grossest

irregularities, it is perfectly clear from the pilot's evidence that they ran the vessel on the shore purposely." In the case at bar, petitioners had no proof of any bad faith by the respondents. (Pet. App. A-35)

Petitioners also cite The Boston, 3 T. Cas. 932 (Cir. Ct. of Mass. 1833), again for the proposition that a salvor must carry out his duties in good faith. The court in The Boston states: "The compensation to be awarded, therefore, presupposes good faith, meritorious service, complete restitution, and incorruptible vigilance, so far as the property is within the reaching or under the control, of the salvors." Petitioners once again ignore the fact that the district court found respondents to have acted in good faith and that petitioners had no proof of bad faith. Equally as important, this citation ignores the simple fact that the ownership of the steel was the first and foremost issue in dispute between the parties at trial.

Petitioners make further citation to Norris, *Benedict on Admiralty* (7th Ed. Rev. 1999). Norris, however, confirms that the total forfeiture of the salvage award is only appropriate when the property has been "looted, stolen, concealed, unlawfully appropriated, embezzled, destroyed, etc. and the proof of such acts has been established beyond a reasonable doubt." Id. at §104, pg. 8-16. (Petitioners Writ at p.14)(emphasis added). Petitioners, however, failed to meet that burden of proof.

Norris also discusses the salvor's duty regarding the property and ends the quotation cited by petitioners as follows: ". . . The salvor does not simply have the right to keep the salvaged property and should he do so, would become subject to a suit for conversion." (Petitioner's Writ at

p. 15)(emphasis added). In the case at bar, the petitioners brought just such a suit for conversion. The true issue on appeal, however, is in a suit for conversion can a good faith salvor and purchaser recoup the salvage lien by means of an affirmative defense?

b) From Uniformity with International Law To Viability of the Salvage Claim

The next litany of headings in the petitioners' writ begins with a discussion of the uniformity of international law, continues through the potential impact on foreign commerce and federal admiralty courts and ends with an argument regarding the viability of the salvage claim. Aside from the obvious attempt to expand the alleged impact of lower courts' decision to the wider world, the premise of all of these sections of petitioners' argument is that the lower courts' decisions is a significant departure from this Court's precedent. As discussed previously, the lower courts' decision which allowed a good faith salvor and purchaser to offset an award of damages through the recoupment of the salvage lien is not a departure from this Court's precedent.

Not surprisingly, petitioners' argument relating to the uniformity of international law contains no citation, nor for that matter, any argument pertaining to the perceived impact on the true issue before this Court.

Likewise, petitioners' discussion regarding the exclusive power of this Court to change the law ignores the simple fact that the lower courts of this country have fashioned the law within the precedent and parameters of this Court's decisions for over 200 years.

Petitioners' section on "technological revolution" is of no moment to the case at bar because technology does not impact the right of a good faith salvor and purchaser to compensation or credit for the salvage lien.

Petitioners' discussion relating to the potential effect on interstate and foreign commerce presupposes the creation of uncertainty in the law. Contrary to petitioners' arguments, the lower courts' decisions do not create any uncertainty or contradiction in the law. Rather, the lower courts' decisions simply reaffirm this Court's precedent that a good faith salvor has a duty to preserve the salvage goods for the owner's interest and not to sell or convey the salved goods without an adjudication of the title in a court of competent jurisdiction. Failure to do so will result in an award of damages for conversion. These decisions also reaffirms that a good faith salvor has the right to receive credit for his efforts in salvaging goods for the benefits of its owner, and further demonstrates admiralty courts' universal disdain of unjust enrichment.

Such a ruling does not cast maritime commerce into chaos nor affect the authority of federal admiralty courts. Nothing in the lower courts' decisions has any impact on a federal admiralty court's jurisdiction to adjudicate the salvage claims. As such, the lower courts' decisions does not create the two systems of law alleged by petitioners.

The final section of petitioners' writ discusses the viability of the respondents' salvage claim. This section of petitioners' writ raises an issue for the first time on appeal-the nonexistence of the salvage lien. In light of petitioners' failure to raise this issue before the lower courts, the argument should not be considered. Grubbs v. General Electric Credit

Corp., 405 U.S. 699 (1972) (stating the general proposition that issues cannot be raised for the first time on appeal and are, therefore, waived); see also, Meglio v. Merit Sys. Protection Bd., 758 F. 2d 1576 (Fed. Cir. 1984).

On its merits, petitioners' discussion of viability confuses the assertion of the salvage lien for defensive purposes with the prosecution of the lien as a separate action. Petitioners incorrectly argue that because the steel was consumed respondents could not bring an in rem action nor in personam action against petitioners because of their lack of possession of the steel. The case at bar is not about the prosecution of a salvage lien as a separate action but, rather, the defensive use of the lien as a set off in a suit over ownership of the steel.

Finally, petitioners' argument on viability ignores the inherent power of admiralty courts to fashion equitable relief when facts and circumstances require. Here, the district court found good faith, and, to avoid an unjust enrichment to petitioners, allowed respondents to recoup the salvage lien. This decision is not in contravention of this Court's precedent nor does it create any confusion. A.K. Steel respectfully submits that there was no error by the lower courts and petitioners' writ should be denied.

## CONCLUSION

A review of petitioners' conclusion to their writ provides the Court with the true perspective on what the respondents, American Eagle and A.K. Steel, have had to endure for the last five years of litigation. From "embezzlers" to "pirates" to finally "seagoing opportunists", petitioners have repeatedly attempted to portray the respondents as

parties who the courts should disdain. These "arguments" by counsel for the petitioners are nothing more than that- arguments!

At the trial of this matter, counsel for the petitioners made the same "arguments" but, as the district court found, offered "no proof of bad faith on the part of A.K. Steel or American Eagle...". (Pet. App. A-35). Moreover, the district court, after hearing petitioners' counsel's "arguments" and receiving the evidence, concluded that American Eagle and A.K. Steel had acted in "good faith". (Pet. App. A-15).

More importantly, petitioners did not raise the issue of the district court's factual finding of the respondents' "good faith" or the alleged "bad faith"on appeal to this Court. The reason for this election is relatively simple- petitioners cannot offer any "evidence" to overcome the district court's factual finding of "good faith" and the resulting "manifest error" standard of review. Accordingly, respondent A.K. Steel respectfully requests this Court to dismiss petitioners' "arguments" concerning the alleged "bad faith" of respondents without consideration.

Beyond the "smoke" of petitioners' allegations of bad faith lies the "mirror" of petitioners' misdirected arguments. Rather than answering the question concerning the perceived error of the lower courts in allowing the recoupment of a salvage lien or even answering its own issue concerning the alleged "exclusive" ways to preserve the salvage lien, petitioners' conclusion provides a rambling insight into the lack of cohesive legal argument to support their writ application. For example, petitioners argue the Court should review "the breakdown of the numbers" to show that they were inequitably treated by the lower courts. Petitioners argue

that, after paying nearly a million dollars for the steel, they "received a mere $37,000." (Pet. Brief at pg. 28). The judgment by the district court, however, belies this argument. (Pet. App. A-40). Petitioners paid Duferco $986,352.41 to resolve the insurance dispute over the steel. The district court awarded petitioners total damages of $827,277.06 or 83.87% of their payment to Duferco against UMS, American Eagle and A.K. Steel. The remaining monies went to UMS as the coinsurers.

Another example of petitioners' misdirection is the "Nostradamus" - like foreshadowing of doom to the concept of uniformity in admiralty law. Putting aside petitioners' clairvoyance, their writ does not provide any legal authority to support their argument that a salvage lien must be "exclusively" preserved in the two manners argued. The decision of Falgout Bros. v. The S/V Pangaea, 966 F. Supp. 1143 (S.D. Al. 1997) does not provide any guidance for the issue on appeal because it addresses the affirmative prosecution of a salvage lien as a separate action. Falgout Bros. does not address the defensive use of a salvage lien as a recoupment against damages in a lawsuit over ownership of salved goods.

Rather than the complicated scenario portrayed by the petitioners, the issue before this Court is relatively simple- did the lower courts commit reversible error by allowing the respondents to set off an award of damages to the petitioners by the recoupment of a good faith salvage lien?

Certainly, petitioners do not contest respondents' ability under the Federal Rules of Civil Procedure to raise recoupment as an affirmative defense under *Fed. R. Civ. P.*, Rule 8(c). Likewise, petitioners cannot contest that both

respondents properly raised the issue of the salvage lien and a request for set off as an affirmative defense. *Fed. R. Civ. P.*, Rule 8(c), Rule 15(c), (Res. App. C, D). Accordingly, the narrower issue for this Court to decide is whether salvage law allows a good faith salvor and purchaser to set off an award of damages by recoupment of the salvage lien? If the answer is yes, then the lower courts did not commit any reversible error.

While this Court has never specifically addressed the issue of recoupment of a salvage lien, the Court has acknowledged that the general principal of recoupment in applicable in a number of contexts. Reiter, supra; and U.S. v. Western Pacific R. Co., 352 U.S. 59,71,1 L. Ed. 2d 126, 77 S. Ct. 161 (1956). Nor is the principal of recoupment foreign to cases in admiralty law. Distribution Services, supra and Basic Boats, supra. Moreover, the principal of recoupment is based in equity, which is the very bedrock of admiralty law.

Petitioners, on the other hand, would have this Court fashion a rule that would deprive a good faith salvor and purchaser of the benefits of their efforts because they asserted their salvage lien via an affirmative defense instead of a separate cause of action. Not only would such a holding run counter to the primary purpose of the merger of the Admiralty Rules with the Federal Rules of Civil Procedure but it would also encourage a race to the courthouse. Under petitioners' rule, an owner could file a claim first and defeat a salvor's claim or defense. Even more ominous, an owner could wait until the expiration of the salvage statute of limitations or, as in this case, until the salved goods were sold and consumed to file a suit for damages and bar the defense of recoupment of the salvage lien. Neither scenario comports with the equitable principles which guide this Court, sitting in

admiralty. Nor does petitioners' proposed rule overcome the principle of unjust enrichment of petitioner to the detriment of the good faith salvor and purchaser.

Rather than creating a contradiction, as argued by petitioners, the lower courts' decisions simply reaffirms this Court's long standing precedent- a salvor has a duty to preserve the salvaged goods for the benefit of the owner and not to sell those goods, even if they are believed to be abandoned, until the adjudication of title in a court of competent jurisdiction. Failure to do so will result in an award of damages in a conversions suit. In the case at bar, those damages were an additional $190,975.68, plus costs and interest, above the salvage lien. Such damages coupled with the specter of attorney's fees provide a substantial deterrent to the wayward salvor portrayed by the petitioners.

Once the Court disregards the disparaging arguments regarding alleged bad faith and the predictions of doom, the remainder of petitioners' writ provides only a scintilla of substantive argument and even less case support. Petitioners' writ does not cite a single case that a salvage lien must be preserved "exclusively" in the manners argued. Equally as important, petitioners' writ refuses to even address the real perceived error of the lower courts- the use of recoupment in a salvage case.

Respondent A.K. Steel respectfully submits that the lower courts did not commit reversible error by allowing respondents to set off the award of damages to petitioner through the recoupment of their good faith salvage lien. Accordingly, respondent A.K. Steel respectfully requests this Court deny the relief requested by petitioners.